

DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES

POLICIES AND PROCEDURES

Subject:
**SERVICE RECIPIENT'S RIGHT TO
ACCESS AND AMEND HIS OR HER
PROTECTED HEALTH INFORMATION**

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Entity responsible:
Office of Legal
Counsel

1. Purpose:

This policy provides instruction and guidance on the preservation of service recipient's records and the right of service recipients to access and amend their protected health information (PHI) under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Federal regulations governing the Confidentiality of Alcohol and Drug Abuse Patient Records, other relevant Federal laws, and the Tennessee Code Annotated.

2. Definitions:

- 2.1 Correctional Institution: Any penal or correctional facility, jail, reformatory, detention center, work farm, halfway house, or residential community program center operated by, or under contract to, the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, for the confinement or rehabilitation of persons charged with or convicted of a criminal offense or other persons held in lawful custody. Other persons held in lawful custody includes juvenile offenders adjudicated delinquent, aliens detained awaiting deportation, persons committed to mental institutions through the criminal justice system, witnesses, or others awaiting charges or trial. (45 CFR §164.501)
- 2.2 Health Care Provider: A provider of medical or health services and any other person or organization that furnishes, bills, or is paid for health care in the normal course of business.
- 2.3 Legal Representative: The conservator of the service recipient; attorney in fact under a power of attorney who has the right to make disclosures under the power; parent, guardian or legal custodian of a minor child; guardian *ad litem* for the purposes of the litigation in which the guardian *ad litem* serves; treatment review committee for a service recipient who has been involuntarily committed; executor or administrator of an estate; temporary caregiver under Tenn. Code Ann. §34-6-302; or guardian as defined in the Uniform Veteran's Guardianship Law at Tenn. Code Ann. §34-5-102.

- 2.4 Protected Health Information (PHI): Individually identifiable health information [IIHI] which is information that is a subset of health information, including demographic information collected from an individual, and created or received by a health care provider; and relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and that identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual; and that is transmitted or maintained in electronic media, or any other form or medium. Specifically excluded from this definition is IIHI contained in education records covered by the Family Educational Rights and Privacy Act (20 USC §1232g) and IIHI contained in employment records held by a covered entity in its role as employer. (45 CFR §160.103)
- 2.5 Psychotherapy Notes: Notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes **excludes** medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date. (45 CFR §164.501)
- 2.6 Qualified Mental Health Professional (QMHP): For purpose of this policy, a person who is licensed in the state and is a psychiatrist; physician with expertise in psychiatry as determined by training, education, or experience; psychologist with health service provider designation; psychological examiner, or senior psychological examiner; licensed clinical social worker; marital and family therapist; nurse who has a master's degree in nursing who functions as a psychiatric nurse; professional counselor; or if the person is providing service to service recipients who are children, any of the above educational credentials plus mental health experience with children.
- 2.7 Service Recipient: A person who is receiving service, has applied for service, or for whom someone has applied for or proposed service because the person has a mental illness, serious emotional disturbance, or a developmental disability.

3. Policy:

3.1 Preservation of Records

- 3.1.1 All PHI records must be preserved for a minimum of ten (10) years after the service recipient was discharged from the facility or ended treatment.

- 3.1.2 PHI records of service recipients who ended their treatment while still minors should be preserved for ten (10) years after the eighteenth (18th) birthday.
- 3.2 Access Permitted; Exceptions. Pursuant to Tenn. Code Ann. §§ 33-3-112 and 68-11-304 to the extent applicable, upon written request, a service recipient or former service recipient sixteen (16) years of age or older, parent(s) or guardians of a minor child, or legal representative, as defined in Subsection 2.3 of this Policy, shall be permitted, within thirty (30) days, the opportunity to inspect and obtain a copy of PHI maintained in his or her medical record for as long as the PHI is maintained by the Department of Mental Health and Developmental Disabilities Central Office (DMHDD) or a Regional Mental Health Institute (RMHI), except to the extent that:
- 3.2.1 Access to the PHI is expressly restricted or prohibited by another statute.
- 3.2.2 A qualified mental health professional (QMHP), as defined in Subsection 2.6 of this Policy, has determined that the access requested poses a risk of serious harm to the health or safety of the service recipient or another person.
- 3.3 Access Denied; No Review. The DMHDD/RMHI may deny a request for access, and the denial is not subject to review, under the following circumstances:
- 3.3.1 The PHI is in psychotherapy notes as defined in Subsection 2.5 of this Policy.
- 3.3.2 The PHI is compiled in reasonable anticipation of, or for use in, a civil, criminal or administrative action or proceeding (i.e., lawsuits and similar proceedings).
- 3.3.3 The DMHDD/RMHI is subject to the Clinical Laboratory Improvements Amendments of 1988 (CLIA), 42 USC §263(a) to the extent the provision of access would be prohibited by law, or the DMHDD/RMHI is exempt from CLIA pursuant to 42 CFR Part 493.3(a)(2). These provisions of the CLIA concern laboratory tests and research conducted in forensic facilities and reporting of communicable diseases.
- 3.3.4 The PHI is requested by an inmate of a correctional institution, as defined in Subsection 2.1 of this Policy, and the disclosure would jeopardize the health, safety, custody or rehabilitation of the inmate or other persons inside or outside the correctional institution.
- 3.3.5 The PHI is created or obtained by a covered health care provider in the course of research that includes treatment. In such cases, the service recipient's access to PHI may be temporarily suspended for as long as the

research is in progress, provided the service recipient gave his or her informed consent to the denial of access when agreeing to participate, and with the understanding that access would be reinstated at the end of the research.

3.3.6 The PHI requested is contained in records subject to the Privacy Act, 5 USC §552(a), and denial of access meets the requirements of the Privacy Act. This section of the Privacy Act contains definitions of records maintained on individuals as well as conditions of disclosure and access. The HIPAA regulations regarding an individual's access to his or her private information is based on the Privacy Act guidelines.

3.3.7 The PHI requested was obtained under a promise of confidentiality from someone who was not a health care provider and access would likely reveal the source of the information.

3.4 Access Denied; Denial Reviewable. A service recipient is entitled to have the denial of access reviewed by a QMHP who did not participate in the original decision to deny the access, under the following circumstances:

3.4.1 A QMHP has determined that the access requested poses a risk of serious harm to the health, life, or physical safety of the service recipient or another person;

3.4.2 The PHI makes reference to another person who is not a licensed health care provider and access is reasonably likely to cause harm to that other person; or

3.4.3 The access request is made by the service recipient's legal representative and such access is reasonably likely to cause harm to the service recipient or another person.

3.5 Right to Request Amendment

3.5.1 A service recipient, former service recipient, or legal representative may request, in writing, to have the service recipient's medical record amended by revision, deletion, or addition to correct the record. An explanation for the change(s) must be included with the request.

3.5.2 The DMHDD/RMHI may or may not accept the requested amendment. If the DMHDD/RMHI refuses the amendment, the service recipient may file a written statement disagreeing with the refusal. All actions must be documented and placed in the service recipient's medical record.

4. Procedure/Responsibility:

- 4.1 When request is received. When a DMHDD/RMHI employee receives a written request from a service recipient or appropriate legal representative to inspect, copy, or amend the service recipient's medical record, the employee must forward the request to the Privacy Officer/designee. If a verbal request is received, the employee must inform the individual that State law requires the request to be in writing and may provide a copy of DMHDD's Authorization to Release Information form, or direct the person requesting information to the form on the DMHDD website at: http://www.state.tn.us/mental/legalCounsel/mhdd_lawforms.html
- 4.2 If service recipient needs assistance with authorization form or written request. If the service recipient requires assistance in completing an authorization form or written request, the DMHDD/RMHI employee shall provide assistance. The employee must deliver the written request to the Privacy Officer/designee.
- 4.3 Review the request. The Privacy Officer/designee must review the request and determine if there is an obligation under HIPAA, other Federal law, or State law to provide access to the PHI to the service recipient or his or her legal representative.
- 4.4 If access is granted. If the Privacy Officer/designee determines that access must be provided, the Privacy Officer/designee must, within thirty (30) days of receipt of the request, provide the PHI to the service recipient at a convenient time or location and in the form that the service recipient requested. If access to the PHI cannot be provided in the form requested, the service recipient and DMHDD/RMHI may agree on an alternative form to provide access to the information requested.
- 4.5 If access is denied. If the Privacy Officer/designee denies access to the PHI, the Privacy Officer/designee must notify, in writing, the service recipient of the denial within thirty (30) days of receipt of the request. The writing must state:
- 4.5.1 The basis for the denial, and if applicable, a statement that the service recipient may have the right to have a QMHP chosen by the DMHDD/RMHI review the decision to deny access to the PHI.
- 4.5.2 The procedure by which the service recipient may file a complaint with the DMHDD/RMHI; and the title, address and telephone number of the person with whom the complaint can be filed; and
- 4.5.3 The procedure by which the service recipient may file a complaint with the Secretary of the U.S. Department of Health and Human Services.
- 4.6 If the denial is to be reviewed. If the service recipient chooses to have the denial of access to PHI reviewed, the Privacy Officer/designee must appoint a QMHP, not involved in the original decision to deny the service recipient access, to

review the service recipient's request. The service recipient and the DMHDD/RMHI are bound by the determination made by the reviewing QMHP.

- 4.7 If request to amend accepted. If the DMHDD/RMHI accepts the requested amendment, the service recipient's record must be amended, and the service recipient informed, within ten (10) days. The service recipient's request for amendment and a copy of the DMHDD/RMHI response must be placed in the service recipient's medical record.
- 4.8 If request to amend refused. If the DMHDD/RMHI refuses the requested amendment, the DMHDD/RMHI must provide a written explanation to the service recipient within ten (10) days. The service recipient's request for amendment and a copy of the DMHDD/RMHI response must be placed in the service recipient's medical record.
- 4.9 Service recipient's disagreement with refusal. If the DMHDD/RMHI refuses to amend the record, the service recipient may file a written statement disagreeing with the refusal, but cannot personally alter the record. The service recipient's statement must be placed in the service recipient's medical record.
- 4.10 If record is amended. If any of the disputed information is corrected, it should be clearly noted in the medical record. The date and time the changes were made and the name of the person making the change should be noted in the service recipient's chart and become part of the medical record.

5. **Other Considerations:**

Authority:

Health Information Portability and Accountability Act of 1996; HIPAA Regulations 45 CFR §160.103, 45 CFR §164.501, 45 CFR §164.524, and 45 CFR §164.526; 42 CFR: §493.3(a)(2); Confidentiality of Alcohol and Drug Abuse Patient Records as regulated in 42 CFR Part 2; 5 USCA §552(a); Tenn. Code Ann. §§ 33-1-101 and 33-1-303; Tenn. Code Ann. §§ 33-3-104, 33-3-107, 33-3-112, 33-3-113 and 33-3-206; Tenn. Code Ann. §34-5-102; Tenn. Code Ann. §34-6-302; and Tenn. Code. Ann. §68-11-304.

Approved:

Commissioner

Date